

No. 16,147

IN THE

United States Court of Appeals
For the Ninth Circuit

WILL M. GILLIS,

Appellant,

VS.

MINERS AND MERCHANTS BANK OF ALASKA,
a Corporation,

Appellee.

Upon Appeal from the District Court
for Alaska, Second Division.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

**APPELLANT'S BRIEF DOES NOT DISPENSE WITH THE
ARGUMENT THAT AN ISSUE OF FACT EXISTS.**

Appellee's brief goes to great lengths in parading a series of facts involving the various mortgages, notes and other transactions between the Appellant, Appellee, and the North Star playing a substantial role in the transaction. The \$15,000.00 constantly referred to in Appellee's brief (p. 12) was the same sum which was included in the \$110,000.00 mortgage executed and

issued by the North Star to the bank and included in such mortgage. This fact remains undisputed and was conceded by the defendant. (Tr. pages 17 and 59.) Defendant's Answer, and Deposition of Manning.

A reading of the transcript and the Appellee's brief does not dispel the issue that there is a serious controversy between the parties as to the arrangement entered into prior to and at the time of the execution of the assignment to the Appellee and that an understanding was had between the parties, according to the Appellant's version, to the effect that the specific monies collected by the Appellee represented the proceeds of the school contract and were to be handled in a certain manner and were to form no part or portion of the series of transactions had before between the parties.

That such a doubt must be resolved in favor of the parties against whom an application for a summary judgment is made has been clearly confirmed in the recent case decided by this court, April 24, 1959,

Robert N. Cameron and Jack Crawford, Appel-
lants,

vs.

Vancouver Plywood Corporation, Appellee.

In an application made for a summary judgment involving a recovery of damages for breach of an oral contract to log timber the court stated as follows:

"In deciding whether there is a genuine issue as to any material fact, the circumstance that a

particular pleading, deposition, admission, or affidavit is taken as true is not determinative. An issue of fact may arise from the countering inferences which are permissible from evidence accepted as true. As stated in *Slocum v. New York Life Insurance Co.*, 228 U. S. 364, 388-389, ‘. . . the admission (of facts on demurrer) . . . must be of the facts, and not merely the evidence from which their existence is inferable. . . .’ See, also, *Guerrero v. American Hawaiian Steamship Co.*, 9 Cir., 222 F.2d 238, 243.

All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment. *Toebelman v. Missouri-Kansas Pipe Line Co.*, 3 Cir., 130 F.2d 1016. It is especially necessary to be cautious in making such a determination where, as here, a jury trial has been demanded. *Cox v. English-American Underwriters*, 9 Cir., 245 F.2d 330, 332, 333.

Having concluded that there is here a genuine issue as to a material fact, the judgment is reversed and the cause is remanded for further proceedings.”

CONCLUSION.

The arguments urged in the Appellant’s brief, namely, that there was a question of fact as to the circumstances under which the assignment was delivered and as to what disposition was to be made of the proceeds over and above the specified advances

made by the bank on such contract, are fully applicable.

Dated June 29, 1959.

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